

No. 48744-6-II

Court of Appeals, Div. II,  
of the State of Washington

---

**Steve Berschauer,**

Appellant,

**v.**

**State of Washington, Department of  
Enterprise Services, et al.,**

Respondents.

---

Brief of Appellant

---

Kevin Hochhalter  
Attorney for Appellant

Cushman Law Offices, P.S.  
924 Capitol Way South  
Olympia, WA 98501  
360-534-9183  
WSBA # 43124

with

Jon E. Cushman  
Daniel Berner  
Cushman Law Offices, P.S.  
924 Capitol Way South  
Olympia, WA 98501  
360-534-9183

## Table of Contents

|  |    |
|--|----|
| 1. Introduction.....   | 1  |
| 2. Assignments of Error .....  | 1  |
| 3. Statement of the Case.....  | 2  |
| 3.1 The State claims ownership of Berschauer's land.....   | 2  |
| 3.2 The State includes Berschauer's land in a<br>boundary line adjustment without Berschauer's<br>consent.....   | 3  |
| 3.3 The trial court dismisses Berschauer's claim that<br>the boundary line adjustment is void, on the<br>grounds of the LUPA statute of limitations.....                       | 4  |
| 4. Summary of Argument .....   | 5  |
| 5. Argument.....   | 5  |
| 5.1 Dismissal under CR 12 is reviewed de novo. ....  | 5  |
| 5.2 The State's boundary line adjustment was void<br>because it was not approved by all property<br>owners as required by the Olympia Municipal<br>Code. ....                  | 6  |
| 5.3 The trial court erred in dismissing Berschauer's<br>declaratory judgment action because a challenge<br>to a void act is not subject to any statute of<br>limitations. .... | 9  |
| 6. Conclusion .....  | 12 |

## Table of Authorities

### Table of Cases

|  |           |
|--|-----------|
| <i>Allstate Ins. v. Khani</i> , 75 Wn.App. 317, 877 P.2d 724 (1994) .....  | 9         |
| <i>Bilanko v. Barclay Court Owners Ass'n</i> , 185 Wn.2d 443,<br>375 P.3d 591 (2016) .....                         | 6, 9, 11  |
| <i>FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.</i> , 180 Wn.2d 954, 331 P.3d 29 (2014) ..... | 6         |
| <i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397,<br>120 P.3d 56 (2005) .....                                 | 9, 10, 11 |
| <i>J.S. v. Vill. Voice Media Holdings, LLC</i> , 184 Wn.2d 95,<br>359 P.3d 714 (2015) .....                        | 5         |
| <i>Noel v. Cole</i> , 98 Wn.2d 375, 655 P.2d 245 (1982).....   | 6         |
| <i>S. Tacoma Way, LLC v. State</i> , 169 Wn.2d 118,<br>233 P.3d 871 (2010) .....                                   | 9, 10, 11 |

### Constitutional Provisions

|                               |   |
|-------------------------------|---|
| Wash. Const. art. I § 16..... | 8 |
|-------------------------------|---|

### Statutes/ Rules

|   |             |
|---|-------------|
| CR 12.....                                  | 4, 5        |
| Olympia Municipal Code (OMC) 17.30.010..... | 7           |
| OMC 17.30.030 .....                         | 3, 7, 8, 10 |
| OMC 17.30.040 .....                         | 7, 8, 10    |
| RCW 36.70C.040.....                         | 4, 10       |

## 1. Introduction

Berschauer owns a portion of a vacated street in the City of Olympia. The State wanted the vacated street to support its “Wheeler Project,” a large office building it was building to the north of Berschauer’s property. Without ever contacting or negotiating with Berschauer, the State obtained a quitclaim deed from a third party and included Berschauer’s land, including a portion of his four-plex, in a boundary line adjustment application to the city of Olympia.

The boundary line adjustment is void *ab initio* for failure to include Berschauer, an owner of some of the property that was being adjusted. This Court should reverse dismissal of Berschauer’s claim and remand for further proceedings.

## 2. Assignments of Error

### **Assignments of Error**

1. The trial court erred in dismissing Berschauer’s claim for declaratory judgment.

### **Issues Pertaining to Assignments of Error**

1. The City of Olympia Municipal Code requires a boundary line adjustment to be signed by all parties who have an interest in the property. Berschauer owns a strip of land that the State included in its boundary line adjustment. The State never notified Berschauer or obtained his consent and signature. Is the boundary line adjustment void as a matter of law? (assignment of error #1)

2. A challenge to an act that is void, and not merely voidable, is not subject to any statute of limitations. The boundary line adjustment is void *ab initio*. Did the trial court err in dismissing Berschauer's declaratory judgment action on the basis of the LUPA statute of limitations? (assignment of error #1)

### 3. Statement of the Case

#### 3.1 The State claims ownership of Berschauer's land.

Steve Berschauer is the owner of residential property in Olympia. CP 4. Berschauer's property includes a portion of a city street that was vacated in 1961. CP 5. Berschauer has claimed ownership of the entire south half of the vacated street (25.4 feet wide). *See* CP 95. The State admits that Berschauer and his predecessors obtained title to at least the south 17 feet of the vacated street by adverse possession.<sup>1</sup> CP 45.

In 2009, the State was assembling property for its "Wheeler Project," a large office building just north of the Berschauer property. *See* CP 39. The State wanted to obtain the entire width of the vacated street. *Id.* Stefanie Fuller, the Property & Acquisition Specialist working on the project, stated

---

<sup>1</sup> Whether Berschauer obtained ownership by operation of law when the street was vacated or at a later date by adverse possession, and the extent of his ownership, are the subjects of another action, *Berschauer v. State*, Thurston County Cause No. 13-2-02519-9. *See* CP 93-103. It is sufficient for purposes of this case that Berschauer alleged to own a portion of the vacated street. *See* CP 5.

that it would be “ethically and morally wrong” to seek to acquire the property without negotiating with Berschauer. *Id.*

Nevertheless, without ever contacting Berschauer, the State acquired a quitclaim deed from the power of attorney of a distant, incompetent devisee of the original dedicators of the street, purporting to convey to the State a 263-foot length of the vacated street. CP 5, 95, 99-103. The quitclaim deed included much of the portion owned by Berschauer, including a portion of Berschauer’s four-plex, which was built partially in the vacated street. CP 5, 95, 103.

### 3.2 The State includes Berschauer’s land in a boundary line adjustment without Berschauer’s consent.

The State applied to the City of Olympia for a boundary line adjustment, consolidating a number of parcels into four new parcels. CP 6. One of the new parcels, as drawn and described in the boundary line adjustment, included the portion of the vacated street owned by Berschauer. *Id.* The State did not involve Berschauer in the boundary line adjustment process and did not seek his consent to include his property in the boundary line adjustment. *Id.*; CP 44, 46, 48.

Olympia Municipal Code requires that a boundary line adjustment map must include “acknowledged signatures of all parties having an interest in lots the lines of which are being adjusted.” OMC 17.30.030 (CP 14-15). Neither the State’s

application nor its final map included Berschauer's signature, even though he was an owner of a portion of the property at the time. *See* CP 40-41, 48, 50-52.

3.3 The trial court dismisses Berschauer's claim that the boundary line adjustment is void, on the grounds of the LUPA statute of limitations.

After obtaining a ruling that his predecessors had acquired the south half of the vacated street by adverse possession, Berschauer brought this declaratory judgment action to declare the State's boundary line adjustment void *ab initio* because it was not approved by him as an owner of the property, as required by the Olympia Municipal Code. CP 6-7.

The City of Olympia answered, then moved to dismiss on the pleadings under either CR 12(b)(6) or CR 12(c). CP 17, 29. The City argued that Berschauer's action was barred by the 21-day statute of limitations provided under LUPA, RCW 36.70C.040. CP 30. In response, Berschauer argued that an invalid action is not subject to the 21-day limitation period and that the boundary line adjustment was invalid because it was not approved by all property owners as required by Olympia Municipal Code. CP 56-59. Berschauer submitted additional documents for the court's consideration. CP 34-52. The City presented more documents in its reply. CP 88-103.

The trial court decided the motion as a motion to dismiss under CR 12(b)(6) or CR 12(c), accepting the allegations in the complaint as true. RP, Feb. 26, 2016, at 19; CP 61. The court dismissed the case on the grounds of the 21-day limitation period under LUPA. RP, Feb 26, 2016, at 20.

#### 4. Summary of Argument

The trial court erred in dismissing Berschauer's declaratory judgment claim. This Court reviews the trial court's decision de novo (Part 5.1, below). Berschauer's declaratory judgment action challenged the boundary line adjustment as void *ab initio* because it was not approved by all property owners as required by the Olympia Municipal Code (*see* Part 5.2, below). Because the boundary line adjustment is void, Berschauer's challenge is not subject to any statute of limitations (Part 5.3). This Court should reverse the trial court's dismissal and remand for further proceedings.

#### 5. Argument

##### 5.1 Dismissal under CR 12 is reviewed de novo.

A trial court's ruling to dismiss a claim under CR 12(b)(6) or CR 12(c) is reviewed de novo. *J.S. v. Vill. Voice Media Holdings, LLC*, 184 Wn.2d 95, 100, 359 P.3d 714 (2015). The court accepts as true the allegations in the plaintiff's complaint and may consider hypothetical facts not part of the formal



record. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). The plaintiff's complaint survives a motion to dismiss if any set of facts could exist that would justify recovery. *Id.* at 963. Whether a claim is time barred is a legal question the court reviews de novo. *Bilanko v. Barclay Court Owners Ass'n*, 185 Wn.2d 443, 448, 375 P.3d 591 (2016).

5.2 The State's boundary line adjustment was void because it was not approved by all property owners as required by the Olympia Municipal Code.

Government action is void *ab initio* where the government entity lacks any authority to take the action or where it fails to comply with a statutorily mandated procedure in a way that defeats the underlying purpose of the procedure. *Noel v. Cole*, 98 Wn.2d 375, 379, 655 P.2d 245 (1982). The City of Olympia's purported approval of the State's boundary line adjustment was either without authority or failed to follow required procedures in a manner that defeated the purpose of the requirement.

The City's authority to approve boundary line adjustments is set forth in Olympia Municipal Code Chapter 17.30 (copy provided at CP 14-16). The Code provides, "Every boundary line adjustment ... shall comply with this chapter and with applicable state law. No boundary line adjustment within the limits of the City of Olympia shall be

approved or recorded that does not comply with the criteria below.” OMC 17.30.010 (CP 14).

Under the Code’s requirements, a boundary line adjustment can be approved **“if and only if: ... 5. The map includes acknowledged signatures of all parties having an interest in lots the lines of which are being adjusted.”** OMC 17.30.030 (CP 14-15, emphasis added). Approval of a boundary line adjustment “shall not be final” until all of the requirements are met. OMC 17.30.040 (CP 15). This is a limitation on the City’s authority to act.

The State’s application and map both included only one signature: that of a representative for the State. CP 40-41 (portion of application), 50-52 (map). Berschauer owned a portion of the land that was being adjusted, but he was not involved in the boundary line adjustment, did not consent, and did not sign. CP 6-7, 21, 46. The State never contacted Berschauer and never notified him of what it was attempting to do with his land. CP 44.

Without the signature of Berschauer as an owner of a portion of the property included in the boundary line adjustment, the City of Olympia had no authority to approve the boundary line adjustment. The City’s own Code provides that a boundary line adjustment can only be approved if it bears the acknowledged signature of every person with an interest in the

property. OMC 17.30.030 (CP 14-15). Berschauer owned an interest in the property. Because the State's boundary line adjustment did not include Berschauer's signature, it could not be approved.

The Olympia Municipal Code further provides that no approval is final until the boundary line adjustment bears every necessary signature. OMC 17.30.040 (CP 15). Even though the City purported to approve the boundary line adjustment, that invalid approval cannot be made final, as a matter of law, and is therefore void *ab initio*.

Even if the City had authority generally to approve boundary line adjustments, approval of the State's application without the signature of every property owner defeated the purpose of the requirement: to protect the property rights of all owners. Even if the City was acting in good faith reliance upon the State's application, its approval of the boundary line adjustment in contravention of Berschauer's right to exclusive control over his property is void *ab initio*.

The Washington State Constitution prohibits the taking of property without just compensation. Const. art. I § 16. In applying for the boundary line adjustment, the State claimed to be the owner of all of the property, which it could only be if it had taken Berschauer's property from him. CP 41 (the State's application stated, "I also affirm that I am the owner of the

subject site or am duly authorized by the owner to act with respect to the application.”). Neither the City nor the State had any authority to take Berschauer’s land and incorporate it into the State’s boundary line adjustment without Berschauer’s participation and consent. The boundary line adjustment is void *ab initio*.

5.3 The trial court erred in dismissing Berschauer’s declaratory judgment action because a challenge to a void act is not subject to any statute of limitations.

Challenges to void acts may be brought at any time, regardless of any statutory time bar. *Bilanko*, 185 Wn.2d at 450. A void transaction is subject to challenge at any time, even many years later. *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 124, 233 P.3d 871 (2010). Similarly, void judgments may be vacated regardless of the lapse of time. *Allstate Ins. v. Khani*, 75 Wn. App. 317, 323-24, 877 P.2d 724 (1994).

The City relied on *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) for the proposition that the LUPA statute of limitations applies even when the challenged action was illegal or the challenger lacked notice. However, in *Habitat Watch*, the only challenge to the land use action was the county’s failure to provide required notice. As noted in *S. Tacoma Way, LLC*, failure to comply with notice requirements does not

render an action void *ab initio* because it does not contravene the policy underlying the statutory requirements. *S. Tacoma Way, LLC*, 169 Wn.2d at 124. Because *Habitat Watch* did not involve an act that was void *ab initio*, it is not helpful here.

Even if *Habitat Watch* applies, the court in that case noted that the LUPA limitations period does not begin to run until a land use decision is issued. *Habitat Watch*, 155 Wn.2d at 408 (citing RCW 36.70C.040(2)-(4)). But here, the boundary line adjustment was never actually approved, as a matter of law under OMC 17.30.040 (CP 15), because it did not comply with the requirement of OMC 17.30.030(5) that the map bear the acknowledged signature of every person with an interest in the property being adjusted. The LUPA limitations period could not begin to run because no final approval was ever issued.

Alternatively, *Habitat Watch* ran the limitation period from the time Habitat Watch became aware that they had a challenge. *See Habitat Watch*, 155 Wn.2d at 407-09. Berschauer did not become aware that he had a challenge until Thurston County Superior Court issued a summary judgment order on November 20, 2015, confirming that Berschauer owned the south half of the vacated street by adverse possession. CP 6, 9-13. Berschauer brought his challenge, by this declaratory judgment action, on December 4, 2015, well within 21 days. CP 4.

There is a conflict between *Habitat Watch* (2005) and the supreme court's more recent decisions in *S. Tacoma Way, LLC* (2010) and *Bilanko* (2016). The latter cases hold to the rule that an act that is void *ab initio* can be challenged at any time, regardless of any time bar. *Habitat Watch* is an anomaly that attempts to allow the nonsensical result that actions that are legally void from their inception can somehow be validated by the passage of time (and only 21 days at that!). As noted above, *Habitat Watch* involved an act that was merely voidable (due to lack of notice) and not void *ab initio*. As a result, any language in *Habitat Watch* that would limit challenges to **void** acts to the LUPA statute of limitations is dicta, and need not be followed. The correct result is to hold to the rule that an act that is void *ab initio* can be challenged at any time.

Under this rule, the trial court erred in dismissing Berschauer's declaratory judgment action. The trial court properly assumed the allegations of Berschauer's complaint to be true. RP, Feb. 26, 2016, at 19; CP 61. The trial court went so far as to assume that Berschauer would be able to prove that the boundary line adjustment was void *ab initio*. RP, Feb. 26, 2016, at 20. Under that assumption, the correct result would have been to find that Berschauer's challenge to the void boundary line adjustment could be brought at any time and was not

subject to any statute of limitations. This Court should reverse the trial court's error.

## 6. Conclusion

The City's approval of the State's boundary line adjustment was void *ab initio* because it was done without the approval of Berschauer, in contravention of his property rights. Because a challenge to an act that is void *ab initio*, rather than merely voidable, can be made at any time, regardless of any statute of limitations, the trial court erred in dismissing Berschauer's declaratory judgment action. This Court should reverse and remand for further proceedings.

Respectfully submitted this 8<sup>th</sup> day of September, 2016.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Attorney for Appellant  
[kevinhochhalter@cushmanlaw.com](mailto:kevinhochhalter@cushmanlaw.com)  
924 Capitol Way S.  
Olympia, WA 98501

## CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on September 8, 2016, I caused the original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

|   |  |
|---|--|
| Court of Appeals, Div. II<br>950 Broadway, #300<br>Tacoma, WA 998402  | <input type="checkbox"/> U. S. Mail<br><input type="checkbox"/> Legal Messenger<br><input checked="" type="checkbox"/> Electronic Filing |
| W. Dale Kamerrer<br>Attorney at Law<br><a href="mailto:dkamerrer@lldkb.com">dkamerrer@lldkb.com</a><br><a href="mailto:marry@lldkb.com">marry@lldkb.com</a>   | <input type="checkbox"/> U. S. Mail<br><input type="checkbox"/> Legal Messenger<br><input checked="" type="checkbox"/> Electronic Mail   |
| Mark Barber<br>City Attorney<br><a href="mailto:mbarber@ci.olympia.wa.us">mbarber@ci.olympia.wa.us</a><br><a href="mailto:acoleman@ci.olympia.wa.us">acoleman@ci.olympia.wa.us</a>  | <input type="checkbox"/> U. S. Mail<br><input type="checkbox"/> Legal Messenger<br><input checked="" type="checkbox"/> Electronic Mail   |
| Brian Faller<br>Assistant Attorney General<br><a href="mailto:brianf@atg.wa.gov">brianf@atg.wa.gov</a><br><a href="mailto:angelab@atg.wa.gov">angelab@atg.wa.gov</a><br><a href="mailto:melissael@atg.wa.gov">melissael@atg.wa.gov</a><br><a href="mailto:tpcef@atg.wa.gov">tpcef@atg.wa.gov</a>  | <input type="checkbox"/> U. S. Mail<br><input type="checkbox"/> Legal Messenger<br><input checked="" type="checkbox"/> Electronic Mail   |
| Michael R. Scott<br>Attorney at Law<br><a href="mailto:mrs@hcmp.com">mrs@hcmp.com</a><br><a href="mailto:smp@hcmp.com">smp@hcmp.com</a>   | <input type="checkbox"/> U. S. Mail<br><input type="checkbox"/> Legal Messenger<br><input checked="" type="checkbox"/> Electronic Mail   |
| Courtney L. Seim and Bryan Case<br>Attorneys at Law<br><a href="mailto:cseim@riddellwilliams.com">cseim@riddellwilliams.com</a><br><a href="mailto:bcase@riddellwilliams.com">bcase@riddellwilliams.com</a><br><a href="mailto:agaigalaite@riddellwilliams.com">agaigalaite@riddellwilliams.com</a><br><a href="mailto:croberts@riddellwilliams.com">croberts@riddellwilliams.com</a> | <input type="checkbox"/> U. S. Mail<br><input type="checkbox"/> Legal Messenger<br><input checked="" type="checkbox"/> Electronic Mail   |



DATED this 8<sup>th</sup> day of September, 2016.

/s/ Rhonda Davidson  
Rhonda Davidson, Legal Assistant  
rdavidson@cushmanlaw.com  
924 Capitol Way S.  
Olympia, WA 98501  
360-534-9183

## CUSHMAN LAW OFFICES PS

**September 08, 2016 - 4:47 PM**

### Transmittal Letter

Document Uploaded: 1-487446-Appellant's Brief.pdf

Case Name: Berschauer v. City

Court of Appeals Case Number: 48744-6

**Is this a Personal Restraint Petition?** Yes ☐ No

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Rhonda Davidson - Email: [rdavidson@cushmanlaw.com](mailto:rdavidson@cushmanlaw.com)